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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re N.M., a Person Coming Under
the Juvenile Court Law.

B292852
(Los Angeles County
Super. Ct. No. 18CCJP03590A)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Appellant,

v.

JUDY G. et al.,

Defendants and Respondents.

APPEAL from an order of the Superior Court of Los Angeles County,
Michael E. Whitaker, Judge. Affirmed.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant
County Counsel, and William D. Thetford, Principal Deputy County Counsel,
for Plaintiff and Appellant.

Shaylah Padgett-Weibel, by appointment of the Court of Appeal, for
Defendant and Respondent Judy G.

David M. Thompson, by appointment of the Court of Appeal, for
Defendant and Respondent Anthony M.

The Los Angeles Department of Children and Family Services (DCFS) appeals from a juvenile court order dismissing a petition filed pursuant to Welfare and Institutions Code section 300,¹ subdivisions (a) and (b)(1)² against the co-respondent parents of N.M., Judy G. (mother) and Anthony M. (father).³ The juvenile court found that DCFS failed to carry its evidentiary burden to show that, at the time of the jurisdictional hearing, N.M. was suffering, or was at substantial risk of suffering, serious physical harm. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Prior Dependency Proceeding

On December 25, 2016, mother was driving to the family home. Father, who had been drinking all day, was in the passenger seat and then two-year-old N.M. (born April 2015) was in the back seat. The parents argued, and father threatened to beat mother when they got home. At one point, father pushed on mother's right leg in an effort to force her to step harder on the gas pedal and accelerate. After mother pushed him away father lunged at the gas pedal with his hands, trying to accelerate the car. Mother pulled over and stopped the car. After she resumed driving, father grabbed the back of mother's head; she pushed him away. When the family

¹ Statutory references are to the Welfare and Institutions Code.

² An additional allegation pled under section 300, subdivision (b)(2) was dismissed pursuant to the parties' stipulation and approved by the court. DCFS has not appealed from the dismissal of that allegation.

³ Parents filed separate respondent's briefs but make virtually identical arguments.

arrived home, mother began exiting the car. Father lunged at and choked her. Mother was in extreme pain, and unable to push father away or to breathe, but did not lose consciousness. When father's grasp slipped momentarily, mother honked the car's horn several times to get a neighbor's attention. Mother freed herself from father's grasp, got out of the car and yelled at a neighbor to call the police. Mother tried to retrieve N.M., who had been present throughout the entire violent encounter and was crying. After father prevented her from doing so, mother began to scream. A neighbor heard mother scream and summoned the police. Father resisted arrest, and the officers were forced to subdue him. Mother did not want father to be prosecuted and did not request a restraining order. She complained of neck pain, but refused to go to the hospital. The police referred the incident to DCFS. Father acknowledged that he had "a lot" to drink on the day of the incident, and claimed to have no memory of what transpired during the car ride or of assaulting mother. Father was subsequently convicted of assault and sentenced to 180 days in jail and three years of probation.

A criminal protective order (CPO) was issued on December 28, 2016, restraining father for three years from, among other things, having any contact with mother or N.M. (Pen. Code, § 136.2, subd. (l)(1).)⁴

Based on the incident on December 25, 2016, mother's report of a prior incident in 2012 (before N.M.'s birth), when father choked her, and concerns that father had a history of marijuana abuse and was currently abusing alcohol, DCFS initiated a dependency action in January 2017. (§ 300, subds.

⁴ A superseding CPO in that action was issued on February 9, 2017. The second CPO restrained father from, among other things, having any contact with mother (for 10 years), but did not require that he stay away from N.M.

(a), (b)(1).) N.M. was subsequently deemed a dependent of the juvenile court, and he and mother received family maintenance services from January to November 2017. Father was given monitored visitation, and ordered to complete parenting, domestic violence, anger management courses, and to participate in a 12-step program and submit to drug testing. In December 2017, on DCFS's recommendation, the juvenile court terminated jurisdiction, gave mother sole physical and legal custody, and gave father monitored visitation.

The Instant Dependency Action

On April 27, 2018, DCFS received a report that, during a parole sweep, father was found in the home of N.M.'s paternal grandparents (PGPs), where mother lived with N.M., and that mother had lied and claimed father (found hiding) was not present. Parents acknowledged that father's presence in the home violated the restraining order and terms of his probation, but explained that the circumstances were extraordinary. A relative had died suddenly and PGPs, whom mother described as her only support system, were in Mexico for the funeral. Mother explained that she required dialysis treatments three times per week, each of which took over three hours, and said there was no one except father whom she could ask to care for N.M. while she underwent treatment. Parents told DCFS there had been no additional incidents of domestic violence since father's arrest in December 2017. Mother said father was not living in PGPs' home, but did stay overnight (and possibly longer),

while PGPs were gone. The family was waiting for the restraining order to expire so they could reunite.⁵

DCFS's investigation of N.M.'s living conditions revealed that N.M. was well-cared for, and that mother was attentive, appropriate and met the child's needs. PGPs' home was in clean and in order, and N.M. showed no signs of abuse or neglect. Nevertheless, DCFS concluded that N.M. was at high risk of emotional or physical harm due to mother's neglect, i.e., violation of the restraining order. N.M. was detained from mother's custody on June 4, 2018, and placed in foster care. On June 6, DCFS filed a section 300 petition alleging in counts (a)(1) and (b)(1), that: "[parents] have a history of engaging in violent altercations in the child's presence. On prior occasions in 2016 and 2012, the father engaged in physical violence towards the mother inflicting injuries to the mother's body. [N.M.] was a prior dependent . . . due to the father's violent conduct against the mother and the mother's failure to protect the child. [The] Court ordered the father to have monitored visits. The mother continues to fail to protect the child in that [she] allowed the father to reside in the child's home and to have unlimited access to the

⁵ In May 2018, father's probation officer (PO) informed DCFS that father had been incarcerated due to the parole violation, and no release date was set. The PO also told DCFS that father had largely complied with his probation orders, checked in often and had attended all but a few domestic violence classes (which he missed for work-related reasons). The PO did not view father as "a bad guy." He was just young, immature and part of a close-knit family that did not understand the severity of the restraining order. The PO did not believe the parents had stayed away from one another completely. The PO believed parents intended to remain together and, before father's arrest for the probation violation, would have recommended they seek a peaceful contact order. The PO had no knowledge that father had committed any criminal activity or domestic violence since his arrest in 2017.

mother and the child in violation of a Restraining Order. On 4/27/18, the father was arrested and is incarcerated for Violation of Probation. The parents' history of engaging in violent altercations and failure to comply with the Restraining Order and the mother's failure to protect the child endanger the child's physical health and safety and place the child at risk of serious physical harm, damage, danger and failure to protect."

N.M. was released to mother's care at the detention hearing on June 7, 2018, on condition that she reside with PGPs or a home approved by DCFS.

When interviewed by DCFS in connection with its report for the jurisdiction hearing, mother denied that father posed any danger to her or N.M. She also denied that he had been living with her when DCFS intervened in May 2018, reiterating that he was at PGPs' home due to an emergency in order to care for his son while mother received dialysis. Father echoed this statement, noting the family had agreed it was best that mother and N.M. live with PGPs, while he stayed with N.M.'s maternal grandparents (MGPs). Mother acknowledged that the parents had knowingly violated the court order, but believed it had been necessary to do so under the circumstances, as there was no viable alternative care available for N.M. The paternal grandfather also told DCFS that mother had asked father for help only because the PGPs were in Mexico, and the MGPs were unavailable. PGPs denied that father used drugs.

A contested jurisdiction hearing was conducted on September 19, 2018. The juvenile court observed that the February 2017 CPO—which superseded the CPO issued in December 2016—prohibited father from having contact with mother, but did not prohibit him from contact with his son. The court also noted that father had monitored visitation with N.M., and nothing in the

juvenile court order prohibited mother from either selecting a monitor for father's visits or monitoring them herself.

The court acknowledged that parents “technically” violated the stay away provision of the CPO. However, it found that DCFS had presented no evidence that any additional domestic violence had occurred, no evidence of other violations of the CPO, and no evidence that N.M. was placed at significant risk of harm due to parents’ violation of the restraining order. In the end, the court found that DCFS had failed to satisfy its burden to present sufficient evidence that parents’ conduct had placed N.M. at substantial risk of serious harm at the time of the jurisdictional hearing, or that such physical harm was likely to occur. Over the objections of DCFS and N.M.’s counsel, the court dismissed the petition with prejudice. DCFS timely filed this appeal.

DISCUSSION

The pivotal question under section 300 is whether the circumstances at the time of the jurisdictional hearing subject the child to the defined risk of harm. (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022 (*J.N.*)) DCFS bears the burden of proving by a preponderance of the evidence that the child falls under juvenile court jurisdiction. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1014.)

Generally, a juvenile court’s factual determinations are reviewed for substantial evidence. However, where a party with the burden of proof failed to carry that burden at trial, “the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*); *In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1157; *Almanor Lakeside Villas*

Owners Assn. v. Carson (2016) 246 Cal.App.4th 761, 769.) “Specifically, the question becomes whether appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’” (*I.W.*, at p. 1528.) Because the trial court concluded that DCFS had not met its burden of proof, the question before us is whether the evidence presented by DCFS was sufficient to compel a finding in its favor as a matter of law. (*Ibid.*) As its ruling reflects, the “court considered the conflicting, competing evidence and essentially discounted [DCFS’s] evidence in concluding [the agency] failed to carry [its] burden It is not our function to retry the case.” (*Ibid.*)

Section 300, subdivision (a) requires proof that a child “has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child’s parent or guardian.” Domestic violence may establish a basis for jurisdiction under section 300 subdivision (a) if exposure to domestic violence causes the child to suffer, or to be at substantial risk of suffering, serious physical harm inflicted nonaccidentally by the parent. (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 599.)⁶

The assertion of juvenile court “[j]urisdiction under section 300, subdivision (b)(1) requires proof that a child ‘has suffered, or there is a

⁶ DCFS’s reliance on *Giovanni F.* is misplaced. *Giovanni F.* did observe that a parent’s domestic violence against the other may support a count under section 300, subdivision (a), because the violence was “nonaccidental,” even if the parent did not intend specific harm to the child. (See *Giovanni F.*, *supra*, 184 Cal.App.4th at pp. 598–601.) However, DCFS’s assertions of error focus on neglect allegations under section 300, subdivision (b), not nonaccidental parental misconduct.

substantial risk that the minor will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the minor” (*In re M.W.* (2015) 238 Cal.App.4th 1444, 1453.) Section 300, subdivision (b) requires a showing of “concrete harm or risk of physical harm to the child.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 821.) Domestic violence between parents may support the exercise of jurisdiction under section 300, subdivision (b) if there is evidence such violence is ongoing or likely to reoccur, and has directly harmed the child physically or placed him at risk of physical harm. (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717.) Even an isolated incident of physical violence that places the child at risk of serious physical harm may be sufficient to support a jurisdictional finding. (*J.N., supra*, 181 Cal.App.4th at p. 1025.) Before making such a finding, however, it is incumbent on the court to consider “the nature of the conduct and all surrounding circumstances.” (*Ibid.*) Pure speculation that violent conduct may or is likely to reoccur is insufficient. (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565.) Again, the risk of current or continuing harm to the child must be present at the time of the jurisdictional hearing. (*J.N., at* p. 1022.)

Here, the juvenile court found dispositive our decision in *In re Jesus M.* (2015) 235 Cal.App.4th 104. There, the children’s father, who had committed past domestic violence against the mother, violated a restraining order and was harassing the mother and denigrating her to the children, which upset them. (*Id.* at pp. 107–108.) As this Court observed, domestic violence “‘is a failure to protect [children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.’ [Citations.]” (*Id.* at p. 112.) But the evidence of domestic violence was stale, and the juvenile court expressly declined to assert jurisdiction based on it, limiting its

concern to the father’s violation of the restraining order and its effect on the children’s emotional welfare. (*Id.* at p. 113.) We concluded that isolated concern was insufficient to support jurisdiction under section 300, subdivision (b). (*Id.* at pp. 111-112, 114.) As this and other “[a]ppellate courts have repeatedly stressed, “[s]ubdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness.” [Citations.] Nonetheless, we are repeatedly called on to review jurisdictional findings where, as here, one parent has behaved badly, . . . but presents no obvious threat to the [child’s] physical safety.” (*Id.* at pp. 111–112.)

The juvenile court correctly concluded that *Jesus M.* dictated the result here. The evidence before the court did not compel a finding sustaining the allegations. We find no substantial evidence that parents’ decision to violate the restraining order so father—the only adult available to do so—could care for his son while mother received vital medical treatment, either caused the child serious physical harm, or placed him at substantial risk of such harm. For this reason alone, we affirm. (See *I.W.*, *supra*, 180 Cal.App.4th at p. 1529 [concluding that the trial court’s factual determination was supported by substantial evidence, because the matter was “simply not a case where undisputed facts lead to only one conclusion”].)

“In evaluating risk based upon a single episode of endangering conduct, a juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent’s current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps

taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the criminal courts that would help a parent avoid a recurrence of such an incident.’ . . . [Citation.]” (*In re John M.* (2013) 217 Cal.App.4th 410, 418–419, abrogated on other grounds by *In re R.T.* (2017) 3 Cal.5th 622, 632–633.) Although the nature and circumstances of a single incident of potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances, there must be a basis to conclude there is a substantial risk the parent’s endangering behavior will recur. (*Ibid.*)

Here, the trial court found no evidence that at the time of the jurisdictional hearing father had or was likely to engage in domestic violence against mother, or that parents engaged in other behavior that put N.M. at risk of serious physical harm. There was no evidence of any violent behavior by father since the incident in 2017. There was a single incident of domestic violence which necessitated DCFS’ involvement (a second incident in 2012 occurred before N.M. was born). The evidence showed that, since the 2017 incident, father had taken steps to ameliorate the risk factors and to correct his behavior going forward, by completing domestic violence and parenting programs. Apart from the single probation violation, father’s PO found no fault with his conduct, and expressed no concern that father would engage in further violence. Indeed, the PO had planned to recommend that the parents seek a peaceful contact order so the family could reunite. DCFS presented no evidence and expressed no concern that mother’s parenting of N.M. was otherwise insufficient in any respect.

Here, as in *Jesus M.*, there was simply “no obvious threat to [N.M.’s] physical safety.” (*Jesus M., supra*, 235 Cal.App.4th at p. 112.) The juvenile

court was correct. The evidence of parents' violation of the CPO, based on an urgent circumstance and necessitated by mother's health, was insufficient to support a finding of dependency jurisdiction over N.M. "Dependency proceedings are designed not to prosecute a parent or 'for the reproof and improvement of erring parents,' but to protect children." (*Id.* at p. 113.)

DISPOSITION

The order dismissing the petition for lack of jurisdiction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.